U.S. Department of Labor

Office of Administrative Law Judges
St. Tammy Courthouse Annex
428 E. Boston Street, 1st Floor
Covington, Louisiana 70433

(985) 809-5173
(985) 893-7351 (FAX)

Issue Date: 09 August 2006

CASE NO.: 2006-LDA-47

OWCP NO.: 02-144560

IN THE MATTER OF

C. C.,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL,
Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, c/o AMERICAN INTERNATIONAL UNDERWRITERS,
Carrier

APPEARANCES:
Lewis Fleishman, Esq.,
On behalf of Claimant

John L. Shouest, Esq.,
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, and its extension, the Defense Base Act (DBA), 42 U.S.C. § 1651 *et seq*., brought by C.C. (Claimant) against Service Employers International (Employer) and Insurance Company of the State of Pennsylvania, c/o American International Underwriters

(Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 21, 2006, in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified by deposition (CX-16) and introduced 17 other exhibits which included DOL forms; Claimant's contract of employment, pay check stub and job description with Employer; Claimant's wage statement from Caliber System, Inc; Canadian/U.S. dollar conversion chart, Average Weekly Wage (AWW) calculations; demobilization clearance form; medical records, scheduling form and deposition of Dr. Marcos V. Masson; photographs; Section 7 medical demand; photo of military convey. Employer introduced 6 exhibits including various DOL forms; Claimant's wage records, pre-employment physical and personnel file. The parties filed post-hearing briefs. Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated I find as follows:

1. Claimant was injured on June 17, 2005.

2. Employer filed a Notice of Controversion on March 1, 2006.

3. An informal conference was held on February 1, 2006.

4. Employer/Carrier has paid no disability or medical benefits to date.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant was injured during the course and scope of his employment as an employee of Employer.

2. The date Employer was advised of Claimant's injury.

3. Claimant's AWW at the time of injury.

4. Nature and extent of disability.

5. Section 7 medical benefits.

6. Application of section 20(a) Zone of Special Danger.

7. Attorney fees, interest and penalties.

I. STATEMENT OF THE CASE

A. Chronology

Claimant is a 41 year old male born on May 25, 1965. He was raised in Everett, Washington where he lived for 34 years. (CX-16, p. 10). Currently Claimant resides in Innisfail, Alberta, Canada. (Id. at 8, 10). Claimant has a 12th grade education plus a year of technical training as a mechanic. (Id. at 84). Prior to his employment with Employer, Claimant worked as a heavy equipment truck driver for Caliber Systems in Calgary, Alberta from August 12, 2004 and December 4, 2004, where he loaded and hauled heavy equipment. During this period Claimant made $23,075.82 (Canadian) or $18,692.44 (American). (CX-5, 6; CX-16, p. 49).

On January 10, 2005 Employer hired Claimant as a licensed heavy equipment transport (HET), truck driver to haul equipment in Iraq. (Id. at 8-14, CX-12). This work was similar to his former job for Caliber Systems except for the pay, weather conditions and armed convoy attacks. (Id. at 43-46, 79). Claimant worked for Employer driving trucks in Iraq until demobilized and sent back to the United States on July 18, 2005. (Id at 41). While in Iraq Claimant was initially classified as a heavy equipment-heavy truck driver, but was later upgraded to HET driver. (Id. at 40). Claimant received a base monthly salary of $3,000.00, plus a Foreign Service bonus area differential, and hazard pay due to dangerous conditions including attacks by gun fire. Claimant's had gross earnings of $47,065.59 during this period with gross earnings of $39,555.09 from January 10, 2005 through June 17, 2005 when hurt on the job. (CX-4, 7). Upon returning to the United States Claimant was unemployed from July 18, 2005 through February 21, 2006, when Claimant returned to Canada, went to work for Peak Energy Services as a truck driver at $23.00 per hour (Canadian), 90-95 hours per week doing light work. (CX-16, pp. 11, 58-60).

B. Claimant's Testimony

Claimant testified that on June 17, 2005, Claimant was driving in a convoy from the Iraqi/Kuwait border to Mosul. While at Camp Cedar en route between Navistar and Scania, the convoy stopped and proceeded to load equipment. During the loading operations Claimant noticed an HET truck roll forward due to failure by another driver to properly set the truck

breaks. In order to prevent the truck from striking another truck, Claimant ran to the rolling truck, opened the cab door and set the break. Unfortunately however, in the process of setting the break, Claimant was struck in the left shoulder by the truck door which was covered with armor plating. Convoy Commander, J-Bo apparently observed the incident and asked Claimant if he was all right. Claimant responded: "I don't know." (Id. at 7, 8, 15-20). Claimant reported the incident to another convoy commander, Hernan Mansanares, and eventually saw an employer medic at Camp Anaconda on June 26, 2005, who prescribed Ibuprofen. (Id. at 25-27). Claimant returned with the convoy to its point of origin, Kuwait City, on July 12, 2005. (Id. at 28, 29). While there Claimant sought medical treatment through Employer representatives Charles Sykes and Kenny Booth and was taken to Camp Arifjan on July 16, 2005 where he saw Army Physician, Dr. Bunting who in turn injected him with Lidocaine and cortisone. (Id. at 31-33, 89-91). On July 17, 2005, Employer filled out a demobilization form on Claimant in preparation for his return to the United States indicating Claimant had an unresolved injury. (Id. at 34, 35; CX-9).

Claimant testified that when he left Kuwait on July 18, 2005, he was still suffering from a left shoulder injury. (Id. at 35, 36). Due to this problem Claimant saw shoulder specialist, Dr. Masson on September 14, 2005. Dr. Masson after examining the shoulder recommended surgery of the acromioclavicular joint. (Id. at 38). Thereafter, Dr. Masson has not released Claimant to return to work as a HET or heavy truck driver. (Id. at 56). Employer has consistently refused to provide medical treatment despite demands for such. (Id. at 57, CX-). If Claimant has surgery Dr. Masson anticipates Claimant will be out of work 6 weeks. (Id. at 61). Claimant did not work from July 18, 2005 up through February 21, 2006. (Id. at 62).

Claimant testified that he had no left shoulder injuries prior to June 17, 2005 and passed his pre-employment physical without a problem. (Id. at 39, 86). Claimant testified that as a heavy equipment driver for Employer he had to use his left arm and shoulder to lift and carry heavy chains, and replace tires. (Id. at 48). When hired by Employer Claimant intended to return to the United States at the end of his contract. (Tr. 82). Claimant knew that his contract for employment was for 12 months. (Id. at 83). On cross, Claimant testified that his shoulder has continued to hurt producing a dull, throbbing sensation with numbness from the top of his shoulder into his fingers. (Tr. 105).

C. Testimony of Dr. Marcus Masson

Orthopedic surgeon, Dr. Masson, who specializes in upper extremity surgery and was the past director of upper extremity at UT Medical School in Houston from 1994 to 2004, first saw Claimant on September 14, 2005. On that date he took a history from Claimant concerning his shoulder injury and initial conservative treatment and administered an injection and noted the localization of pain at the AC joint. Claimant's chief complaint was mechanical shoulder pain (CX-11, pp. 9-15). After examining Claimant Dr. Masson opined that Claimant was in need of left arthroscopic distal clavicectomy and within reasonable medical probability the June 17, 2005 injury could have aggravated, accelerated or combined with a pre-existing degenerative condition to result in a need for surgery. (Id. at 16, 17). Dr. Masson testified that he never released Claimant to do strenuous work as required in heavy truck driving with overhead work

resulting in aggravation of the joint. (Id. at 18, 19; CX-13). Dr. Masson noted that Claimant had previous right, but not left arthroscopic surgery. (Id. at 20).

Dr. Masson recommended surgery so as to debride the joint removing about 1 to 1.2 centimeters of collarbone to create a space so that shoulder bones do not grind against each other. (Id. at 21). Dr Masson further recommended doing the surgery at a surgical center as an out patient rather than a hospital so as to reduce costs and estimated up to 6 months before Claimant could resume heavy work. (Id. at 24, 25). Dr. Masson described the surgery as both reasonable and medically necessary preventing Claimant from reaching MMI until performed (Id. at 31). On cross, Dr. Masson admitted Claimant had degenerative change in his left shoulder that predisposed him with an injury to pain. (Tr. 34-37). Further it was possible for Claimant to have recovered to a "certain point" after the initial trauma to the point he was pre-trauma but Claimant's history of no pain before the trauma with normal job performance undermines that assumption. (Id. at 37, 38). Dr. Masson was convinced that the recommended surgery would allow Claimant with appropriate follow up therapy to resume his past heavy duty driving. (Id. at 46; CX-10). Dr. Masson last saw Claimant on May 8, 2006 at which time he was still convinced that surgery was needed. (CX-11, p. 50).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that: (1) he suffered a left compensable injury while working for Employer in Iraq on June 17, 2005 in a "zone of special danger" and under circumstances which triggered a Section 20(a) presumption which Employer failed to rebut; (2) Claimant informed Employer of the injury in a timely manner; (3) as a result of the injury Claimant was unable to do his past truck driving work due to an inability to work overhead and engage in heavy lifting and remained unemployed from July 19, 2005 through February 20, 2006 during which period he was entitled to temporary total disability; (4) on February 21, 2006 Claimant secured suitable alternative employment as a light duty truck driver in Canada entitling Claimant to temporary partial disability; (5) Claimant has not reach maximum medical improvement and is entitled to Section 7(a) medical benefits consisting of left shoulder surgery; and (6) when Claimant undergoes the left shoulder surgery he will be entitled to a further 6 week period of temporary total benefits based upon a Section 10(c) calculation under ***Zimmerman v. Service Employers Int'l Inc.,*** 2004-LHC-927 (March 25, 2005).

Employer argues that: (1) although employed on a dangerous job in Iraq, such a job was under a 12 month contract which could be terminated at will; (2) although Claimant alleged an on the job injury, no incident report was ever filled out with Claimant continuing to drive until July 12, 2005; (3) Claimant had pre-existing degenerative changes in the left shoulder and in 2000 had undergone right shoulder surgery (arthroscopic distal clavilectomy) which is the same procedure currently recommended by Dr. Masson for the left shoulder; (4) while Claimant has presented enough evidence to trigger a Section 20 presumption, there appears to be sufficient evidence to rebut the presumption and demonstrate a lack of causation as confirmed by Dr.

Masson 's alleged failure to perform a differential diagnosis; (5) there is no reliable link between Claimant's current condition and the alleged trauma; (6) Claimant could have obtained suitable alternative employment within a period of 6 weeks after returning to Canada, thereby limiting him to only a 6 week period of temporary total disability; and (7) Section 10© should be used to calculate AWW using a blended approach using Claimant's 52 week earning history prior to his injury combining wages earned at Caliber Systems, Inc., and Employer and dividing by 52.

B. Prima Facie Case

Section 2(2) of the Act defines injury as an accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2)(2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a)(2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated Cir. 2000); ***Kier v. Bethlehem Steel Corp.*****,** 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter*****,** 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*****,** 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also* ***Bludworth Shipyard Inc., v. Lira*****,** 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); ***Devine v. Atlantic Container Lines*****,** 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d 287-88.

In order to show the first element of harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP*****,** 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler*****,** 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp., v. Henderson*****,** 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. ***Adkins v.***

Safeway Stores, Inc.*,** 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP*,** 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); ***Kubin v. Pro-Football, Inc., 29 BRBS 117, 119 (1995) (pre-existing back injuries).

In order to establish the second element, a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm. Rather a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of what might have been. ***Wheatley v. Adler*,** 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's un-contradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); ***Golden v. Eler & Co.***, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, un-corroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that condition existed at work that could have caused the harm. ***Bonin v. Thames Valley Steel Corp.*,** 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.*,** 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); ***Smith v. Cooper Stevedoring Co.*,** 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, ***Leblanc v. Cooper/T. Stevedoring, Inc.***, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); ***Gencarelle v. General Dynamics Corp.***, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. ***Quinones v. H.B. Zachery, Inc.*,** 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation. In Defense Base Act cases such as the present one all that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose. ***O'Leary v. Brown-Pacific-Maxon,*** 340 U.S. 504 (1951).

In this case, I credit Claimant's assertion of a June 17, 2005 injury which is consistent with Claimant's demobilization and unrebutted by any employer witness. Further, I credit Dr, Masson's testimony attributing the need for shoulder surgery to Claimant's June 17, 2005 injury as there is no contrary medical opinion and no substantial basis for discrediting his opinion as Employer would have me do.

C. Nature and Extent of Disability and Date of Maximum Medial Improvement

Disability under the Act is defined as incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. ***Watson v. Gulf Stevedore Corp.***, 400 F.2d 649 (5th Cir. 1968); ***Seidel v. General Dynamics Corp.*,** 22 BRBS 403, 407 (1989); ***Stevens v. Lockheed Shipbuilding Co.*,** 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. ***Hite v. Dresser Guiberson Pumping***, 22 BRBS 87, 91 (1989). ***Care v. Washington Metro Area Transit Authority*,** 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. ***Lozada v. General Dynamics Corp.*,** 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); ***Sinclair v. United Food & Commercial Workers*,** 13 BRBS 148 (1989); ***Trask v. Lockheed Shipbuilding & Construction Co.*,** 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, ***Leech v. Service Engineering Co.*,** 15 BRBS 18 (1982), or if his condition has stabilized. ***Lusby v. Washington Metropolitan Area Transit Authority*,** 13 BRBS 446 (1981).

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. ***New Orleans (Gulfwide) Stevedores v. Turner***, 661 F.2d 1031, 1038 (5th Cir. 1981); ***P&M Crane Co., v. Hayes*,** 930 F.2d 424, 429-30 (5th Cir. 1991); ***SGS Control Serv. v. Director, OWCP*,** 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. ***Elliot v. C&P Telephone Co.*,** 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. ***Walker v. Sun Shipbuilding & Dry Dock Co.***, 19 BRBS 171 (1986).

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. ***Turner*,** 661 F.2d at 1038; ***P&M Crane*,** 930 F.2d at 430; ***Clophus v. Amoco Prod. Co.***, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. ***SGS Control Serv.***, 86 F.3d at 444; ***Palombo v. Director, OWCP*,** 937 F.2d 70, 73 (D.C. Cir. 1991); ***Rinaldi v. General Dynamics Corp.***, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. ***Director, OWCP, v. Vessel Repair, Inc.*,** 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); ***Mijangos v. Avondale Shipyards, Inc.*,** 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the

claimant was able to return to work. ***New Port News Shipbuilding & Dry Dock Co.***, 841 F.2d 540, 542-43 (4th Cir. 1988); ***Bryant v. Carolina Shipping Co., Inc.***, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See* ***Berkstresser v. Washington Metro. Area Transit Auth.*,** 16 BRBS 231, 233 (1984).

Concerning the nature and extent of Claimant's injury, the medical records and Dr. Masson's credible testimony show Claimant in need of shoulder surgery, and thus, not at MMI. Concerning the extent of impairment Dr. Masson has never cleared Claimant to return to work. Indeed, Claimant credibly testified that he could never return to his past heavy truck driving duties thus, establishing a case of total disability until Claimant commenced light duty driving on February 21, 2006 when Claimant commenced suitable alternate employment and became entitled to temporary partial disability. While Employer would have me limit Claimant to only a period of 6 weeks of temporary total disability, I find the record does not support such an assertion in that Claimant symptoms have persisted since leaving Iraq, and there is no showing by Employer Claimant could have secured his light duty driving job earlier than February 21, 2006.

D. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); ***Staftex Staffing v. Director, OWCP,*** 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) nor Section 10(b) can be reasonably and fairly applied, Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); ***Louisiana Insurance Guaranty Assoc. v. Bunol,*** 211 F.3d 294, 297 (5th Cir. 2000); ***Wilson v. Norfolk & Western Railroad Co.,*** 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. ***Leblanc v. Cooper/T. Smith Stevedoring, Inc.***, 130 F.3d 157, 161 (5th Cir. 1997); ***Deewert v. Stevedoring Services of America,*** 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); ***McKnight v. Carolina Shipping Co.***, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

1. Section 10(a)

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. §910(a); *see also* ***Ingalls Shipbuilding, Inc., v. Wooley*,** 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of

what a claimant could have expected to earned in the year prior to the injury); ***Duncan v. Washington Metro. Area Transit Authority*****,** 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker. 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. ***New Thoughts Fishing Co., v. Chilton*****,** 118 F.2d 1028, n.3 (5th Cir. 1997); ***Universal Maritime Service Corp., v. Wright*****,** 155 F.3d 311, 327 (4th Cir. 1998).

2. Section 10(b)

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); ***Bunol*****,** 211 F.3d at 297; ***Wilson*****,** 32 BRBS at 64. Section 10(b) applies to an injured employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; ***Empire United Stevedores v. Gatlin****,* 936 F.2d 819, 822 (5th Cir. 1991).

3. Section 10(c)

If neither of the previously discussed sections can be applied reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); ***Bunol*****,** 211 F.3d at 297-98; ***Gatlin*****,** 936 F.2d at 821-22; ***Browder v. Dillingham Ship Repair***, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). ***James J. Flanagan Stevedores, Inc., v. Gallagher*****,** 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the

ALJ); ***Bunol*,** 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); ***Hall*,** 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); ***Wayland v. Moore Dry Dock*,** 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. ***Gatlin*,** 936 F.2d at 823; ***Cummins v. Todd Shipyards*,** 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling. ***National Steel & Shipbuilding v. Bonner*,** 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. ***Jackson v. Potomac Temporaries, Inc.*,** 12 BRBS 410, 413 (1980).

In this case neither Section 10(a) or 10(b) is applicable since Claimant did not work for Employer for a substantial period of time in the 52 week period prior to his injury, and there is no evidence of comparable employees. Utilizing 10(c), I find the most reasonable approach in light of Claimant employment contrary and intent to work one year for Employer in Iraq is to use a combination of the wages Claimant made driving trucks during the 52 week period prior to injury ($58,247.53) and divide that sum by 52 weeks resulting in an AWW of$1,120.14 with a weekly compensation rate of $746.76. (CX-7).

E. Medical Benefits: Reasonableness and Necessity of Medical Treatment

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. ***Dupre v. Cape Romaine Contractors, Inc.***, 23 BRBS 86 (1989).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920 (stating that it shall be presumed in the absence of substantial evidence to the contrary: (a) That the claim comes within the provisions of this chapter); ***Amos v. Director, OWCP*,** 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); ***Turner v. Chesapeake & Potomac Tel. Co.***, 16 BRBS 255, 257-58 (1984). ***Cf. Schoen v. United States Chamber of Commerce***, 30 BRBS 112, 113-14 (1996)(finding that the Section 20(a) presumption did not apply in determining whether the charges incurred for self procured reasonable and necessary medical treatment were reasonable, and a claimant has the burden of proving the elements of the claim for medical benefits). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. ***Greenwich Collieries,*** 512 U.S. at 281. The Section 20 presumptions were left untouched by ***Greenwich Collieries***. *Id* at 280. Accordingly, once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. ***American Grain Trimmers, Inc., v.***

***Director, OWCP*,** 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer is the burden of production only. *Id*. at 81.

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. ***Romeike v. Kaiser Shipyards***, 22 BRBS 57, 60 (1989); ***Pirozzi v. Todd Shipyards Corp.***, 21 BRBS 294, 296 (1988).

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. ***Salusky v. Army Air Force Exchange Service*,** 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. ***See Conoco, Inc., v. Director, OWCP*,** 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that [o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts not mere speculation that the harm was not work-related.)(citing ***Bridier v. Alabama Dry Dock & Shipbuilding Corp.,*** 29 BRBS 84 (1995); ***Hampton v. Bethlehem Steel Corp.*,** 24 BRBS 141, 144 (1990); ***Smith v. Sealand Terminal*,** 14 BRBS 844 (1982). The Fifth Circuit further elaborated on the substantial evidence test in the context of causation:

> . . . [T]he employer [is] required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption the kind of evidence a reasonable mind might accept as adequate to support a conclusion only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

***Noble Drilling v. Drake*,** 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also*, ***Conoco, Inc.*,** 194 F.3d at 690 (stating that the hurdle is far lower than a ruling out standard).

Once the employer offers sufficient evidence to rebut the Section 20 presumption, the claimant must establish entitlement to the medical procedure based on the record as a whole. *See* ***Noble Drilling Co.,*** 795 F.2d at 481. If, based on the record, the evidence is evenly balanced, and then the employer must prevail. ***Greenwich Collieries*,** 512 U.S. at 281. The opinion of a treating physician is entitled to special weight. ***Brown v. National Steel & Shipbuilding Co.***, 34 BRBS 195, 201 n.6 (2001); ***Cf. Consolidation Coal Co., v. Director, OWCP***, 54 F.3d 434, 438 (7th Cir. 1995)(disparaging a mechanical determination favoring a treating physician when the evidence is equally weighted). An ALJ may credit the report of a treating physician over others as long as there is substantial evidence in the record to support such a conclusion. ***Ceres Marine Terminal v. Hinton*,** 243 F.3d 222, 225 (5th Cir. 2001).

Employer presented no evidence to rebut the reasonableness or necessity of Claimant's left shoulder surgery and past medical treatment for such. Inasmuch as Claimant clearly requested Employer to pay for past and future treatment including shoulder surgery which is both reasonable and necessary, I find Employer is liable for such. *See* ***Caudill v. Sea Tac Alaska Shipbuilding,*** 25 BRBS 92 (1991); ***Anderson v. Todd Shipyards Corp.,*** 22 BRBS 20 (1989); ***McCurley v. Kiewest,*** 22 BRBS 115 (1989).

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.,*** 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co***., *aff'd in pertinent part and rev'd on other grounds, sub nom*. ***Newport News v. Director, OWCP,*** 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See* ***Grant v. Portland Stevedoring Company****, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall be assessed on sums owed for medical services whether the cost were initially borne by claimant, other medical providers.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from June 17, 2005 to February 20, 2006 based on an average weekly wage of $1,120. 14, and a corresponding compensation rate of $746.76.

2. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908 (e) of the Act for the period from February 21, 2006 to present and continuing based upon 2/3 of the difference between Claimant's average weekly wages before the injury ($1,120.14) and his wage-earning capacity after the injury in American dollars.

3. Employer shall pay Claimant for past and future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act including shoulder surgery as recommended by Dr. Masson.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge